STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH FETTER d/b/a WINDSOR ESTATES MOBILE HOME PARK, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 27, 2002
v	No. 228671 Eaton Circuit Court
WINDSOR CHARTER TOWNSHIP, Defendant-Appellant/Cross-Appellee.	LC No. 97-001512-CZ

Before: Hood, P.J., and Holbrook, Jr. and Owens, JJ.

PER CURIAM.

Following a bench trial, the trial court granted plaintiff's request to enjoin defendant ("the township") from enforcing its zoning ordinance to prevent the expansion of plaintiff's mobile home park. Plaintiff had challenged the zoning ordinance by claiming that, as applied, it violated his substantive due process rights. The township appeals as of right. Plaintiff cross-appeals as of right, challenging the trial court's denial of similar relief on two alternate statutory bases. We affirm in part and reverse in part.

Defendant contends that the trial court erred in ruling that plaintiff successfully bore his burden of demonstrating that the township's zoning ordinance was arbitrary and capricious as applied to plaintiff's property. In support of this contention, defendant contends that the trial court failed to presume that the ordinance was constitutional and erroneously placed the burden on the township to prove the constitutionality of the ordinance. In addition, defendant contends that sufficient evidence was introduced to present, at the very least, a legitimate difference of opinion concerning the reasonableness of the zoning ordinance.

Here, the trial court opined that plaintiff met his burden of establishing that defendant had "unreasonably, arbitrarily and capriciously restricted the plaintiff's use of his property." In addition, the trial court concluded that "[n]o public interest is being served by the failure to rezone." The trial court did rule, however, that plaintiff was estopped from challenging the

buffer condition.[1] Ultimately, the trial court enjoined defendant from interfering with plaintiff's development and use of the non-buffer portions of the subject property as a mobile home park.

Generally, to prevail on a substantive due process claim based on a zoning ordinance, a plaintiff must show either: "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). We further explained:

> Three basic rules of judicial review are applicable:
>
> > (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Id.*, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

We review de novo a substantive due process challenge to a zoning ordinance. *Bell River Associates v China Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997).

Initially, we agree with defendant's contention that the trial court failed to both presume that the ordinance was constitutional and place the burden on plaintiff in proving otherwise. *Frericks*, *supra* at 594. For example, the trial court's finding that "no credible evidence has been submitted to justify the reasons stated in denying rezoning" appeared to place the burden on defendant to prove the ordinance's constitutionality. Similarly, the trial court found: "The Court received little credible evidence to advance this reason [high percentage of population in mobile homes]. The best the Township has shown is an increase based upon supposition that may or may not occur." In regard to traffic, the trial court noted that the minutes of the proceedings below indicated that residents were concerned about traffic and sewer odors, but that defendant failed to introduce evidence to support those concerns. Finally, with respect to public opposition, the trial court stated: "While certainly the minutes of the public meeting reflect some public opposition, this does not make the proposed zoning unreasonable." Again, the *Frericks* panel opined that the challenger—plaintiff, in this case—has the burden of proving that the zoning ordinance is unconstitutional. *Frericks*, *supra* at 594.

Regardless, our appellate review of this issue requires us to review de novo the merits of plaintiff's substantive due process challenge. *Bell River*, *supra* at 129. In denying plaintiff's rezoning requests, the township cited several reasons: (i) adjacent property zoned R-1-M; (ii) high percentage of population in mobile homes; (iii) proposed rezoning not in compliance with the master plan; (iv) traffic; (v) aquifer; (vi) sewer odors; (vii) not conforming to land use; and (viii) public opposition.

---

[1] Plaintiff does not challenge this ruling on appeal.

In regard to "adjacent property zoned R-1-M," the trial court found that the development of the property to the north as a mobile home park was unlikely until the water problem is resolved. Indeed, Arthur St. Clair testified that there was a water problem in the area surrounding plaintiff's property, and that this was at least part of the reason why the adjacent land had not been developed. Nevertheless, it is noteworthy that defendant granted an adjacent property a special use permit for development as a mobile home park. Thus, we agree with the trial court's finding that this reason "advances a slight public interest."

In regard to the "high percentage of population in mobile homes," the trial court found that "little credible evidence" was introduced to advance this reason and that defendant had only shown an increase "based upon supposition that may or may not occur." However, the township's 1998 master plan indicated that nearly twenty percent of the housing stock in the township was mobile homes located in mobile home parks. Moreover, although it is uncertain whether the property to the north of the subject property will ever be developed as a mobile home park, the township had granted that property owner a special use permit to construct a mobile home park. On the other hand, no evidence was presented supporting a finding that twenty percent is a "high" percentage of the population. To the contrary, plaintiff introduced evidence suggesting that this was a typical percentage of population in mobile home parks. Accordingly, we agree with the trial court's finding that this rationale was unsupported by the evidence.

The trial court combined discussion of "proposed rezoning not in compliance with the master plan" and "not conforming to land use." The trial court found:

> Both defendant's and plaintiff's experts testified that a mobile home park would be consistent with the current master plan. The defendant, however, argues that the mobile home park was not in conformity with the master plan in effect at the time the Township denied the rezoning. While this is true, it is a misguided reason to deny the current rezoning request. If a rezoning request should be in agreement with the master plan, what appears to be relevant is the present master plan, not the discarded. The question is whether the ordinance is unreasonable, not whether the Township Board was unreasonable at the time it took action. The relevant factor is whether the present ordinance conforms to the present master plan, and it does.[2]

On appeal, defendant contends that the trial court erred by referencing the 1998 master plan. We agree.[3]

---

[2] Although the trial court concluded that the ordinance conformed to the master plan, the trial court's discussion of this reason suggests that it intended to conclude that the rezoning requests conformed to the present master plan.

[3] Plaintiff correctly notes that the only authority cited by defendant in support of its position, *Fox & Associates, Inc v Hayes Twp*, 162 Mich App 647; 413 NW2d 465 (1987), is not actually relevant to this issue. Accordingly, defendant has presented no authority in support of its contention that the trial court erred by referencing the rezoning request's compliance with the 1998 plan. "A party may not leave it to this Court to search for authority to sustain or reject its

(continued…)

"An 'as applied' claim challenges a present infringement or denial of a specific right or of a particular injury in the process of execution of government action." *Frericks, supra* at 595. In contrast, a "facial" claim requires a demonstration that "the existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Id.*

Here, plaintiff claimed that the zoning ordinance was unconstitutional "as applied." Thus, plaintiff's challenge to the constitutionality of the ordinance was based on the township board's conduct in denying his rezoning requests, and not based on the mere wording of the ordinance. Indeed, this is why plaintiff attempted to refute each of the reasons advanced by defendant in denying his rezoning request and the trial court considered the evidence supporting each reason. Accordingly, we believe that the relevant master plan was the master plan in effect when the township board was considering plaintiff's rezoning requests: the 1972 master plan. To be sure, plaintiff introduced expert testimony opining that the rezoning requests complied with the 1972 master plan; however, defendant introduced expert testimony opining that the rezoning requests did not comply with the 1972 master plan. The trial court's findings suggest that it found defendant's expert to be more credible on this issue.[4] Having reviewed the expert testimony, we agree with the trial court's finding. Consequently, we believe that the evidence supported the township's findings with regard to these reasons.

In regard to traffic concerns, defendant's trial exhibits 8, 9, 11, and 12 indicated that there was public opposition from neighbors because of traffic concerns.[5] Moreover, although Blair Ballou testified that Canal Road could handle the additional traffic likely from the proposed expansion, he also testified that it would be necessary to provide turn lanes or deceleration lanes. Although Ballou described these measures as "pretty typical," the fact that the measures would be necessary supports the township board's conclusion that the proposed expansion would create traffic problems. Further, defendant's expert opined that, in regard to traffic, the property to the north of plaintiff's property would be a preferable site for a mobile home park because there is an alternative access point on Billwood Road; in contrast, all the traffic from plaintiff's proposed expansion would have to use Canal Road. Accordingly, we believe that the evidence supported this reason.

Similarly, the township residents expressed a concern about sewer odors. Plaintiff presented testimony from a few adjacent property owners indicating that the mobile home park's sewer system did not produce odors. Arthur St. Clair, the township supervisor, testified that he had received "a lot of complaints" about the sewer odors, but that he had not received recent complaints, noting that "[t]he impression I got from the constituency that lives to the north and

(…continued)

position." *Staff v Marder*, 242 Mich App 521, 529; 619 NW2d 57 (2000). However, our de novo review of this issue requires us to make a finding.

[4] As noted above, the trial court opined that it was "true" that "the mobile home park was not in conformity with the master plan in effect at the time the Township denied the rezoning request."

[5] We have opined that the "purpose of the Township Rural Zoning Act would be defeated if a township board could not consider public opposition to a proposed rezoning classification." *A & B Enterprises, supra* at 164.

east of the park said [sic] that they just got tired and decided to live with it." Logically, granting the expansion and increasing the size of the sewer system would cause a detrimental or adverse impact on those members of the public who were having problems with the odors. As such, we believe that the evidence also supported this reason advanced by the township.[6]

In regard to the aquifer, during the October 4, 1995, hearing, one of the planning commission board members expressed concern about the impact that enlarging the mobile home park's water system would have on the surrounding areas and the township. As noted above, St. Clair testified that there was a water problem in the area surrounding the subject property. In fact, St. Clair testified that he was working on bringing public water to the area. Although the trial court properly noted that there had been difficulty obtaining water in that area, the trial court found that there was no evidence supporting the township's refusal to rezone based on the water system. In light of the evidence submitted in regard to this issue, we believe that the trial court's conclusion is both internally inconsistent and erroneous. Accordingly, we believe that there was evidence supporting this factor.

In regard to public opposition, the trial court noted that the minutes reflected public opposition, but noted that "this does not make the proposed zoning unreasonable." Again, it is permissible for a township to consider public opposition. *A & B Enterprises*, *supra* at 164. Here, defendant introduced the minutes from several hearings below that indicated that there was some public opposition to the expansion. Accordingly, we believe that the evidence supported this reason.

In light of the above discussion, we believe that there was evidentiary support for several of defendant's reasons for denying plaintiff's rezoning requests. In fact, the only reason that was not supported by the evidence was the "high percentage of population in mobile homes." At the very least, the evidence was sufficient for reasonable minds to legitimately differ in weighing whether the reasons advanced by defendant were sufficient to advance a reasonable governmental interest. *Frericks*, *supra* at 594. Similarly, plaintiff failed to introduce sufficient evidence to overcome the presumption that the ordinance was not a "purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Id.* Thus, we believe that plaintiff failed to present sufficient evidence to overcome the ordinance's presumption of validity. *Id*. Accordingly, the trial court erred by concluding that there was merit to plaintiff's as applied challenge to the constitutionality of the zoning ordinance.

Plaintiff's cross-appeal challenges the trial court's dismissal of counts II and III. In count II, plaintiff contended that the zoning ordinance violated MCL 125.2307(6) because mobile home parks were only permitted if a special use permit was granted. MCL 125.2307(6) provides as follows:

---

[6] In addition, it is undisputed that plaintiff declined to participate in the public sewer system. Defendant's expert noted that the "common sentiment among municipal planners is that there are concerns about private [sewer] systems." Defendant's expert explained that the concern arises from residents being forced to rely on private individuals to maintain the sewer system, rather than a municipality-maintained system.

> **A local government ordinance shall not contain roof configuration standards or special use zoning requirements that apply only to, or excludes [sic], mobile homes.** A local government ordinance shall not contain a manufacturing or construction standard that is incompatible with, or is more stringent than, a standard promulgated by the federal department of housing and urban development pursuant to the national manufactured housing construction and safety standards act of 1974, 42 USC 5401 to 5426. A local government ordinance may include reasonable standards relating to mobile homes located outside of mobile home parks or seasonal mobile home parks which ensure that mobile homes compare aesthetically to site-built housing located or allowed in the same residential zone. [Emphasis added.]

The trial court dismissed this count, opining that the statutory provision concerned mobile homes, rather than mobile home parks.

Generally, we review de novo conclusions of law. *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000). Issues of statutory construction are also reviewed de novo. *Hinkle v Wayne Co Clerk*, 245 Mich App 405, 413-414; 631 NW2d 27 (2001).

MCL 125.2307(6) prohibits local ordinances from containing special use zoning requirements that apply to or exclude mobile homes, but does not extend that prohibition to mobile home parks. The Mobile Home Commission Act ("MHCA") separately defines "mobile home" and "mobile home park." MCL 125.2302(g) and (i). In fact, the phrase "mobile home parks" is included in several other subsections of MCL 125.2307, including separate sentences within MCL 125.2307(6). Further, in *People v Ramsdell,* 230 Mich App 386, 392; 585 NW2d 1 (1998), we noted that "the Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior." Thus, we believe that the Legislature knowingly omitted "mobile home parks" from the first sentence of MCL 125.2307(6). Therefore, we conclude that MCL 125.2307(6) does not prohibit ordinances from containing special use zoning requirements that apply only to mobile home parks.[7] Consequently, the trial court did not err as a matter of law by dismissing Count II.

---

[7] Plaintiff contends that we have previously ruled to the contrary. We have opined that MCL 125.2307(6) prohibits a zoning ordinance from containing special use zoning requirements that apply to mobile home parks. *Bell River, supra* at 128-129. Defendant contends, however, that the *Bell River* decision is not binding as dictum. Indeed, in *Bell River*, we noted that the issue of whether the zoning ordinance violated MCL 125.2307(6) was "immaterial to the outcome of the appeal." *Id.* at 127 n 4. We recently defined dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *People v Higuera,* 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting Black's Law Dictionary (7th ed). In light of the definition of dictum, we agree with defendant (and the trial court) that the *Bell River* decision's construction of MCL 125.2307(6) is dictum, and, therefore, not binding.

In count III, plaintiff contended that the zoning ordinance violated MCL 125.297a because it had the effect of totally excluding mobile home parks despite a demonstrated need within the township. MCL 125.297a provides as follows:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Again, we review this issue de novo. *Walters, supra* at 456; *Hinkle, supra* at 413-414.

In *Burt Twp v Dep't of Natural Resources*, 227 Mich App 252, 261; 576 NW2d 170 (1997), aff'd 459 Mich 659 (1999) we noted that, pursuant to MCL 125.297a, "[a]n ordinance that has the effect of totally prohibiting a particular land use within a township is impermissible in the absence of special circumstances." "A zoning ordinance may not totally exclude a lawful land use where (1) there is a demonstrated need for the land use in the township or surrounding area, and (2) the use is appropriate for the location." *Id.*

In the instant matter, the trial court found:

> The plaintiff himself owns a mobile home park containing a significant percentage of dwelling units within the Township. Mobile home dwellings now compose 20% of the total housing in the Township and mobile homes are increasing at a rate higher than the growth of other types of housing. The plaintiff has failed to demonstrate an unlawful exclusion of mobile homes within the Township.

In other words, the trial court essentially found that the zoning ordinance did not have the effect of totally prohibiting mobile homes. Thus, the trial court dismissed plaintiff's claim based on MCL 125.297a.

Indeed, the 1998 master plan indicated that there were approximately 2,500 dwelling units in the township in 1996. Testimony indicated that plaintiff's mobile home park contained approximately 470 units. Thus, approximately 18.8 percent of the dwelling units in Windsor Township were mobile homes specifically located in plaintiff's mobile home park. In addition, the 1998 master plan recognized that, between 1980 and 1996, mobile homes:

> increased by 86 percent, a much faster rate than other housing types. This is a reflection of the increased cost of housing, putting a larger number of people out of the home buying market. It is also a result of an aging population and the changing composition of households from traditional families to single parent or single person households.

As noted above, defendant has also approved a special-use permit for the property to the north of plaintiff's property so that it can be developed as a mobile home park. Thus, whether looking at mobile homes or mobile home parks, defendant's zoning ordinance certainly did not have "the

effect of totally prohibiting" mobile home parks within the township. *Burt, supra* at 261. Accordingly, we do not believe that the trial court erred by dismissing plaintiff's Count III.

In summary, we affirm the trial court's dismissal of plaintiff's claims alleging violations of MCL 125.2307(6) and MCL 125.297a. We reverse the trial court's conclusion that defendant's zoning ordinance, as applied, violated plaintiff's substantive due process rights.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ Donald S. Owens